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JAN 4 1904
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# In the Supreme Court of the United States.

OCTOBER TERM, 1903.

H. HACKFELD & CO., LIMITED,
*v.*
THE UNITED STATES.
} No. 527. 1904.

*PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.*

## BRIEF IN OPPOSITION TO THE PETITION.

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## BRIEF IN OPPOSITION TO THE PETITION.

The Government opposes the granting of a writ of certiorari in this case, for the reason that the only question of sufficient importance to justify its issuance—whether or not section 10 of the act of March 3, 1891, makes the master, agent, consignee, or owner of a vessel a guarantor of the safe custody of an alien unlawfully brought into the United States—was not considered by the circuit court of appeals, whose judgment is sought to be reviewed, nor, so far as the record shows, did it enter into the judgment of the district court.

In affirming that judgment, the circuit court of appeals, after stating the case, said (Transcript of Record, pp. 52–56):

> The plaintiff in error invokes the rule that a penal law must be strictly construed, and contends that within the meaning of section

10 of the act of 1891 there can be no neglect to comply with the obligation thereby imposed if a reasonable attempt be made to perform the same. The case of *Warren* v. *United States* (58 Fed., 559), decided by the circuit court of appeals for the first circuit, is an authority adverse to this contention; but the plaintiff in error earnestly urges that the doctrine of that case involves a misconception of the true meaning of the statute, and it cites the case of *United States* v. *Spruth* (71 Fed., 679), in which the district court of the eastern district of Pennsylvania doubted the wisdom of such a construction of language in a criminal statute. In the view which we take of the record which is before us, it becomes unnecessary to enter into a discussion of this question. The case was tried before the court without a jury upon an agreed stipulation of facts. In the stipulation appears the fact that the two Japanese who were ordered to be deported, and who had been taken by the plaintiff in error on its steamer from San Francisco to Honolulu en route to Japan, escaped from the vessel while she was lying at anchor at the port of Honolulu, and that they made their escape through portholes from which they dropped or descended into the sea. The record contains no finding of fact by the court further than that the plaintiff in error was found guilty as charged, nor does it state the ground on which the trial judge found the plaintiff in error guilty of the misdemeanor charged. For aught that we know,

the court found that by placing the men in the room, as it did, without taking precaution against their escape through the port-holes, the plaintiff in error neglected to perform the obligation imposed upon it by the statute. It is true that the stipulation of the facts recites that the escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or of the plaintiff in error, and that the method of the escape could not have been reasonably anticipated. But the court was not bound by these recitals, nor was it prevented thereby from placing upon the stipulated facts the construction which in its judgment they should properly bear. (*Haight* v. *Green*, 19 Cal., 113.) The assignment of error is that the court erred in rendering judgment upon the pleadings and the facts therein stated. If the trial court entertained the opinion, as may well have been the case, that the plaintiff in error was guilty of negligence in placing the deported persons in a room on board the vessel from which port-holes, visible and open, afforded means of escape to anyone who could swim a short distance to the shore, we, in our own view of the facts, could find no ground to question the correctness of that conclusion. The rule is that the burden is on the plaintiff in error to show error in the trial court. In this case we think it has failed to meet the requirements of the rule. The judgment will, therefore, be affirmed.

The question as to the proper construction of section 10 of the act of March 3, 1891, is undoubtedly a matter of public importance, and the Government itself is interested in having it finally settled. But not having been considered by either of the courts below, that question is not, we think, so presented by this record as to call for its determination in the extraordinary manner now invoked. This would be so even if the view of the circuit court of appeals as to the effect to be given the recital in the stipulation of facts of absence of negligence were erroneous, which I do not concede, but deem it unnecessary to discuss. The very importance of the question seems to require that, if possible, the court be aided in its adjudication by some expression of opinion on the part of the court whose judgment it would be called upon to review.

I may add, in further explanation of the position of the Government, that I am informed by the United States attorney for the northern district of California that there is now pending in the circuit court of appeals for the ninth circuit a case in which the main question sought to be here raised is squarely presented.

For the reasons stated, it is submitted, the petition should be denied.

HENRY M. HOYT,
*Solicitor-General.*

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